FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS

CASES AND MATERIALS

Fourth Edition

Donald L. Doernberg
C. Keith Wingate
Donald H. Zeigler

American Casebook Series®

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CASES AND MATERIALS

Fourth Edition

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West's Law School Advisory Board

The First Edition was dedicated:

To my Fathers
D.L.D

To Lilly, Clarence, Christine, and A.D.
C.K.W.

The Second Edition was dedicated:

To Cyndy
D.L.D.

To Gloria
C.K.W.

The Third Edition is dedicated:

To Chris Felts
D.L.D.

To the memories of Harriet Tubman, W.E.B. DuBois, and John Brown
C.K.W.

To my Father
D.H.Z.

The Fourth Edition is dedicated:

To Don Zeigler
D.L.D.

To Brenda, Marvin, Terry and Oliver
C.K.W.

To Brannon Heath
D.H.Z.

Preface to the Fourth Edition

The changing of the guard at the Supreme Court has resulted in the Court becoming increasingly active in some areas that had been relatively quiescent. Chief Justice Roberts' replacing Chief Justice Rehnquist and Justice Alito's taking Justice O'Connor's seat appear to have shifted the Court's alignment to some extent. To keep pace, we have had to make some difficult choices about what to retain and what to replace with newer material, always with an eye toward keeping the book teachable and of reasonable length. We retain our commitment to not letting the book become a research tool rather than a teaching tool. We also recognize, however, that teachers often have differing views about which cases are too important to reduce to notes and how they tie into the themes of the book. Accordingly, several of the full length cases that we have reduced to notes are available at full length, with their notes and questions, in the back of the Teacher's Manual for teachers to reproduce and distribute if they find it desirable to do so.

Chapter 1, dealing with justiciability, is a constant challenge. The Court has done so much with the doctrine of standing over the years that the subject could easily overwhelm the chapter and the book. Last year, the Court decided two cases, *Massachusetts v. Environmental Protection Agency* and *Hein v. Freedom from Religion Foundation*. We have made *Massachusetts v. EPA* a main case, replacing *FEC v. Akins*, which we have reduced to a note. *Hein*, on the other hand, although certainly current, seems less doctrinally important at this point, so it appears as a textual discussion following the material on *Flast v. Cohen*. We have revised the extensive notes that followed *FEC v. Akins* into what we hope is a more accessible hornbook-style section of text.

Chapter 2, Congressional Control of Jurisdiction, is fundamentally the same, but we have added some note material to take into account the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, congressional responses to the government's proceedings with regard to "enemy combatants," whether aliens or United States citizens. The Court has not decided what may turn out to be the most significant (or at least the first significant) case involving those statutes, *Boumediene v. Bush*, now awaiting argument.

Chapter 3, Federal Question Jurisdiction, has also undergone some changes because of the Court's recent decisions. The uncertainty that the majority opinion created in *Merrell Dow* finally (after almost twenty years) resulted in the Court's attempt to clarify it in *Grable*. Whether that attempt succeeded remains to be seen. In any event, *Grable* now appears as a main case following *Merrell Dow*. The Court's other fed-

eral-question-jurisdiction case, *Empire Healthchoice v. McVeigh*, appeared as a main case in the 2006 and 2007 Supplements. We have reduced *Empire* to two notes, one in Chapter 3 and one in Chapter 5. Frankly, *Empire* does not seem to add anything doctrinally to federal question jurisdiction. The major battle among the Justices concerns the choice-of-law question, and hence the case's primary significance seems to us to be a common law matter, not a jurisdictional one. The jurisdictional determination flows directly from the determination of the choice-of-law issue, much as was the case in *Lincoln Mills*. There, the Court created federal common law and so found jurisdiction; in *Empire* the majority declines to create federal common law to govern the dispute.

The Chapter 5 materials are essentially unchanged. Although *Empire Healthchoice* was predominantly a common-law battle, it does not add anything doctrinally to the Court's existing common-law jurisprudence. The Justices split over how they should strike the balance, but the balancing mechanism is unchanged.

Chapter 7 similarly did not have major changes. While we presented *Central Virginia Community College v. Katz* as a main case in the last two annual supplements, it now seems to us far more likely to end up as a special-case exception to the general rule of *Seminole Tribe*, if it survives at all given the change in membership on the Court. Accordingly, it appears as the last note following *Seminole Tribe*.

In Chapter 10, *Exxon Mobil v. SABIC* continues as a main case, replacing *Garry v. Geils*. Time will tell whether the Court's attempt to clarify the distinction between *Rooker-Feldman* and preclusion doctrine succeeds.

The habeas corpus materials, Chapter 11, remain a challenge. In no other area has the Court decided as many cases. It would not be possible to be exhaustive without being exhausting, so we have tried, in selecting cases to insert as new note materials, to distinguish between those that are doctrinally important to the functioning of the federal courts as an institution and those that are simply interpretations of the various statutes that do not directly affect the federal courts' functioning. This, too, is an area where the volume of available materials could easily overwhelm the course; we have tried to avoid that.

We continue to use editing conventions to limit length and remove matter that does not contribute to understanding. Within the cases, we omit without ellipsis citations that are not of pedagogical importance and some of the Court's footnotes. The remaining footnotes in cases retain their original numbers. Where the Court is clearly quoting itself, we omit the citation unless it is peculiarly important to understanding the substantive point. Similarly, when the Court quotes a clearly identified source (for example an IRS policy in *Allen v. Wright),* we have omit-

ted the citation unless it is necessary for understanding. Authors' footnotes within cases are lettered rather than numbered; other authors' footnotes are consecutively numbered within each chapter. Within the material we have written, we have avoided endless repetition of citations; if we have recently cited a case, we then refer to it by its commonly-used short name. When citing state-court cases, we have included both the official reporter citation and citations to the West regional and individual-state reporters. The current version of the Bluebook may frown on it, but we think it is a service to the reader.

March, 2008

Acknowledgments

From Professor Doernberg:

Cyndy still smiles at me (despite this project). After twenty-five years together, she still makes my universe light up. Doug and Emily were not merely supportive in a general way; they helped with some of the work the putting a book together entails (for pay, of course). I deeply appreciate their help. I predict that neither of them will ever take Federal Courts.

I have received wonderful support from the students and administration of Pace Law School. My students constantly push me to go every more deeply into the material, and I am grateful for that. They make teaching an enormous amount of fun and, whether they know it or not, they contribute to my education as I hope I do to theirs. Dean Michelle Simon has been behind this project from the very beginning. Adam Rahal has provided wonderful research assistance, and his intelligence and intellectual curiosity has helped me make many of the length and coverage decisions that inhere in this sort of endeavor.

Forty-two years ago, I met Don Zeigler in our first weekend in law school, at opposite ends of a forward pass. As the quarterback, I have always thought it fortunate that we were on the same team. We have been on the same team ever since. We went through law school together, worked in the Special Litigation Unit of the Legal Aid Society in New York together, and taught together as Pace for five years before he moved on to New York Law School. He has contributed enormously to my development as a writer, to my understanding of this subject, and to my life throughout our four-plus decades. His work on this book cannot be overstated. One of Don's real gifts is his way of imposing order and structure on confusion—as, for example, the proliferation of the Court's habeas corpus decisions.

I treasure his friendship.

From Professor Wingate:

First, I want to thank Gloria Wingate, my wife. I do not know what I

would do without her, but do know it would not be nearly as much fun. Next, I would like to thank my co-authors, Don Doernberg and Don Zeigler. One could not ask for finer people to work with on any project. I again want to thank my colleague Evan Tsen Lee for his continued willingness to talk Federal Courts with me. Also, I want to thank Dean Nell Newton and Academic Dean Shuana Marshall of the University of California Hastings College of Law for all the support they have provided me to work on this new edition. It is greatly appreciated. Finally, I want to thank Stephen R. Lothrop, Beverly Taylor, Meseret Mekuria, and Divina Morgan. They make up the Office of Faculty Support, provide me with excellent secretarial assistance and administrative support, and make my life so much easier.

From Professor Zeigler:

My thanks again to Professors Doernberg and Wingate for the opportunity to contribute to the fourth edition as well as the annual supplements. Our conversations continue to enhance my understanding of the materials and help my teaching. I also thank my wife, Professor Brannon Heath, for her helpful comments and her patience as I have worked on the fourth edition and the supplements.

Preface to the Third Edition

In the four years since the second edition, the Court has focused more narrowly on some areas, leaving others entirely untouched. The third edition continues the basic organization and structure of the earlier editions. Recent years have witnessed important changes in particular areas, but the underlying themes of the course remain the same. Our editing decisions continue to be made to help elaborate those themes. There has, for example, been no significant doctrinal development in the areas of congressional control of jurisdiction (Chapter 2), federal question jurisdiction (Chapter 3), legislative courts (Chapter 4), abstention (Chapter 8) and supreme court review of state court decisions (Chapter 9). On the other hand, the Court has spoken out on standing and mootness (Chapter 1), federal common law (Chapter 5), the Eleventh Amendment (Chapter 7), and federal habeas corpus (Chapter 11). That is not to say that there has been no action in the other areas; it simply has come more as tinkering around the edges rather than major doctrinal exposition; those developments are covered in notes or text rather than as principal cases.

Chapter 1 now includes *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* The case really could appear in either the standing or mootness subsections. We have chosen the latter, because the Court makes a considerable effort to compare standing and mootness, so it is desirable to have read through both subsections before undertaking *Laidlaw*.

Chapter 5 on federal common law contains *Semtek International, Inc. v. Lockheed Martin Corp.* That case surprised more than one Federal Courts scholar, because the Court appeared in *Boyle v. United Technologies Inc.* and *Atherton v. FDIC* to have interred the technique of using state law as the content of federal common law. *Semtek* demonstrates that reports of the technique's demise were indeed premature.

We have revised the Notes and Questions in Chapter 6. Some of the Notes following *Harlow v. Fitzgerald* have been reorganized in light of the recent decisions, *Saucier v. Katz* and *Hope v. Pelzer,* and we present much of the discussion as textual narrative rather than notes.

Chapter 7, on the Eleventh Amendment, has undergone significant reorganization. We have included *Giles v. Harris*, a 1903 case that, when combined with *Hans v. Louisiana*, appeared to represent the federal judiciary's complete abdication of any responsibility for enforcing the Civil War Amendments on behalf of black citizens. One may see *Ex parte Young*, a watershed case by any measure, as the Court's turning back from this course.

Chapter 8 has no new main cases. The Supreme Court has not been active in the abstention area in recent years. We have substantially revised the Notes and Questions, however, and the final case of the chapter, *Wilton v. Seven Falls Company,* is reduced to a Note.

We have also made substantial revisions to the Notes and Questions in Chapter 9. The Supreme Court rulings in *Bush v. Palm Beach County Canvassing Board* and *Bush v. Gore* are discussed briefly. We clarify the Notes explaining how the Court proceeds when the respondent seeks to block Supreme Court review based on a state procedural default. Two recent cases, *Lee v. Kemna* and *Nike v. Kasky*, also are discussed.

Since the last edition came out, we have added a chapter on the *Rooker-Feldman* doctrine (at the suggestion, we might add, of Judge William Fletcher of the Ninth Circuit). The doctrine represents another arena in which the federalism battle between state and federal judiciaries plays out. This chapter now precedes the concluding chapter on federal habeas corpus.

The final chapter dealing with Federal Habeas Corpus is much changed, bearing faint resemblance to its predecessor. We have entirely reorganized the chapter, reducing some cases to text discussion or note status and highlighting others that are more doctrinally significant than we originally appreciated. The Court continues to be extremely active in this area. That is exciting, but it also challenges one to assemble a usable chapter that does not overwhelm the rest of the course. Indeed, justiciability, federal common law, the Eleventh Amendment and federal habeas corpus could each make a fine two credit seminar, the only difficulty then being that no school allocates to the Federal Courts course the twelve or thirteen credits it would then take to cover all the material in depth.

We have rewritten the introductory habeas material to clarify the doctrinal changes made by the Warren Court. Headings are revised, new cases are added, and the Notes and Questions are substantially rewritten. Several main cases in the Second Edition have been reduced to notes to make way for new material and because of space constraints. One of the trio of so-called enemy combatant cases decided June 28, 2004, *Rasul v. Bush*, is added as a main case. Another, *Padilla v. Rumsfeld*, is described in a detailed note. Although those cases do not concern the relationship of the federal government to the states, they do provide the most current indication of the Court's view of the function of the once Great Writ.

We continue to use editing conventions to limit length and remove matter that does not contribute to understanding. Within the cases, citations that are not of pedagogical importance are omitted without ellipsis, as are some of the Court's footnotes. The remaining footnotes in

cases retain their original numbers. Where the Court is clearly quoting itself, the citation is omitted unless it is peculiarly important to understanding the substantive point. Similarly, when the Court quotes a clearly identified source (for example an IRS policy in *Allen v. Wright),* we have omitted the citation unless it is necessary for understanding. Authors' footnotes within cases are lettered rather than numbered; other authors' footnotes are consecutively numbered within each chapter. Within the material we have written, we have avoided endless repetition of citations; if we have recently cited a case, we then refer to it by its commonly-used short name. When citing state-court cases, we have included both the official reporter citation and citations to the West regional and individual-state reporters. The current version of the Bluebook may frown on it, but we think it is a service to the reader.

October, 2004

Acknowledgments

From Professor Doernberg:

My family still acknowledges me at the end of this project, which is remarkable testimony to their tolerance; the least I can do is to acknowledge them as well. My wife Cynthia Pope again has come to terms with the ugly reality that one does not write a casebook; one marries it, particularly so in an area in which the Court is predictably active and predictably unpredictable. She and my children Doug and Emily Pope have graciously surrendered time that should have been theirs.

As always, several students have contributed their talents. John Tenaglia, with whom I put together the *Rooker-Feldman* chapter two summers ago and Jennifer Odrobina, who did much to keep it current, were marvelous. Oren Gelber has worked with me this summer and has done a job that is simply beyond description. Her understanding, insight, willingness to offer comments and suggestions and incredible attention to detail have made this project far better than it would otherwise have been. In many ways, she has mastered this difficult subject on her own after only her first year. She has performed brilliantly, and it is my great pleasure to acknowledge my debt to her.

Chris Felts, to whom I dedicate this book, is what Isaak Walton would have called a "compleat" human being, and that is something I do not say lightly. I have known Chris since 1970, when he was four. He is in every way my son save for the small matter that we share no genes. But what does Mother Nature know anyway? In all the ways that really count, we are father and son, and the relationship has brightened my life in innumerable ways over the years, recently multiplied as Chris and his wife have made me a grandfather twice since 2000. He is an extraordi-

narily special fellow, and I am enriched for knowing him.

From Professor Wingate:

I seem to always be thanking the same people in my acknowledgements. My wife Gloria continues to be a great source of support and inspiration to me in everything I do, and I would be remiss not to acknowledge it. Again, I would like to thank my colleague Evan Tsen Lee for his willingness to share his vision of and ideas about Federal Courts. The Office of Faculty Support here at Hastings continues to make my life much easier with the excellent secretarial and administrative assistance it provides. Thanks to the people there, Stephen R. Lothrop, Ted Jang, Barbara Topchov, Beverly Taylor, and Cecillia Bruno. Finally, I would like to thank my students. I hope they realize that there is a method in the madness.

From Professor Zeigler:

My thanks to Professors Doernberg and Wingate for asking me to join as an author for the third edition. It is an honor to be included. In addition, our conversations about the substance of the course have deepened my understanding of the material and given me new ideas about how to teach it. My thanks also to my wife, fellow law professor Brannon Heath, for her assistance and patience.

I am also grateful for the research assistance of Annie McGuire, Class of 2005, and Julia Khalavsky and Tim Regan, Class of 2006. Ms. McGuire helped with the substantial revision of the chapter on Habeas Corpus. Understanding this complex and rapidly changing area of the law was a challenge for both of us, and her sheer analytical prowess was of real assistance. Ms. Khalavsky and Mr. Regan provided invaluable help in revising the Notes and Questions in several chapters. The Notes and Questions are sharper, clearer, and will be more valuable to students because of their efforts.

Preface to the Second Edition

The basic approach reflected in the first edition still seems to us to facilitate study of this unusually arcane subject. The intervening six years have seen some significant shifts in particular doctrines or subdoctrines, but the basic themes of the subject as a whole remain unchanged. We have therefore tried to continue to select (and edit out) materials according to how well they elaborate those themes rather than for the particular rule of an individual case.

Chapter 1 now includes two additional cases on standing that may indicate substantial shifts in the Court's approach. At least some Members of the Court appear to be rethinking the jurisprudence of "generalized grievances," and issues of Congress's ability to create standing continue to draw judicial attention.

Chapter 2 has expanded by the addition of *Plaut v. Spendthrift Farm*, in which Congress endeavored (unsuccessfully) to undo a nonconstitutional Supreme Court decision with which it disagreed. *Plaut* again brought to the fore issues of the interplay of judicial and legislative power and policymaking. There is also another conflict brewing in this area, involving the Prison Litigation Reform Act. At this writing, no case under that statute has reached the Supreme Court, but the Circuit Courts have been busy with issues reminiscent of both *Plaut* and *Klein*. It does not require much of a crystal ball to suppose that the Supreme Court will choose to address those issues in the not-too-distant future.

We have reorganized the principal cases in Chapter 5 in the wake of *Atherton v. FDIC*, which appears to mark a significant change in the Court's approach to federal common law and the vertical choice-of-law process generally.

Chapter 6 has also changed considerably. *Board of County Commissioners v. Brown* offers a new perspective on municipal liability, and Justice Breyer's explicit suggestion that the Court re-examine part of *Monell v. Department of Social Service* suggests that the law in this area is entering a period of reevaluation. In the interests of space, we have eliminated principal case coverage of the cases in the first edition from *Paul v. Davis* through *Zinermon v. Burch*, since those cases have far more to do with the contours of § 1983 *per se* than with the role of the federal courts as institutions.

The Court's decision in *Seminole Tribe of Florida v. Florida* caused us to reorganize Chapter 7. Covering the cases chronologically seems to us to make study of this complex area even more difficult. Accordingly, after presenting the basic doctrine as in the first edition, we have attempted to arrange the succeeding cases according to how they view (and affect) *Hans v. Louisiana* and *Ex parte Young*, still the foundation cases

for the Court's Eleventh Amendment jurisprudence. Indeed, after *Alden v. Maine* and the *College Savings Bank* cases from the 1998 Term, *Hans* arguably takes on even greater importance than one might have thought even three years ago.

The passage of the Antiterrorism and Effective Death Penalty Act of 1996 has also caused us to take a fresh look at the Chapter 10 materials. The interaction of the statute and the Court's pre-existing doctrine is certainly not entirely clear at this point, nor is it easy to say whether or to what extent Congress has changed the underlying substantive law of the writ. The statute is less than pellucid; the inferior federal courts and ultimately the Supreme Court should be kept busy for the next few years attempting to make sense of it.

We have retained the editing conventions from the first edition that we used to limit length and remove matter that does not contribute to understanding. Within the cases, citations that are not of pedagogical importance are omitted without ellipsis, as are some of the Court's footnotes. The remaining footnotes in cases retain their original numbers. Where the Court is clearly quoting itself, the citation is omitted unless it is peculiarly important to understanding the substantive point. Similarly, when the Court quotes a clearly identified source (for example an IRS policy in *Allen v. Wright),* we have omitted the citation unless it is necessary for understanding. Authors' footnotes within cases are lettered rather than numbered; other authors' footnotes are consecutively numbered throughout each chapter. Within the material we have written, we have avoided endless repetition of citations; if we have recently cited a case, we then refer to it by its commonly-used short name.

January, 2000.

Acknowledgments from the Second Edition

From Professor Doernberg:

The principal burden of support for this project has fallen once again on my family: Cyndy, Emily, and of course Doug, who suggested to me on more than one occasion that my priorities were seriously out of alignment because I had to work on the book rather than to play Age of Empires™ with him on the computer. I can appreciate his viewpoint (indeed, there were times when I agreed wholeheartedly), and I am grateful all of my family for their understanding and tolerance.

I have benefited greatly over the six years since the first edition from the comments, questions, and support of Professor Eric Muller of the University of North Carolina School of Law. This product is far better

for his generosity than it otherwise would have been.

I want also specifically to mention my indebtedness to all of those from schools around the country who participate in the Federal Courts faculty e-discussion group. The continuous exchange of views is enjoyable and most educational, I hope for all of us. It represents the best of what education has to offer: people exerting themselves to gain and share with others understanding of a subject truly worth thinking hard about.

Three students have borne the brunt of the research assistance for the completion of the second edition: Karen A. Anderson of the Class of 2000 worked with me for an entire calendar year, very often adding a valuable additional viewpoint of how parts of the book would work for students. When she began working with me she had not taken the course; by the time she finished she had and is now probably as well qualified to teach the course as any beginning teacher. Sally S. Benvie and Anne DeSutter of the Class of 2001 worked with me for the summer of 1999, and the project reflects their care and diligence as well. It is not possible in a short space to give enough credit to the contributions of all three as researchers, editors, welcome critics, and, most valuably, friends. Some errors have undoubtedly slipped through, but only because I still had my hands on the project after they had finished.

From Professor Wingate:

I would again like to acknowledge the support and assistance of my wife Gloria. She deserves a great deal of the credit for everything I accomplish or produce. Also, I would like to thank my colleague and Federal Courts fellow traveler Even Tsen Lee. He has always been available to offer his wisdom and valuable counsel. The Office of Faculty Support here at Hastings has provided me with excellent secretarial assistance which has made all my work much easier, including my work on this second edition. Consequently, I would like to thank the people in that office, Steven R. Lothrop, Ted Jang, Barbara Topchov, Sonja Starks, and Beverly Taylor.

As I did in the first edition, I would like to thank my Federal Courts students. They continue to teach me.

Preface to the First Edition

Federal Courts is one of the most difficult courses in the law school curriculum. The concepts are highly abstract; the doctrine is remarkably complex; the courts are open to the well-founded suspicion that their application of the doctrine is often inconsistent. Consequently, the subject presents an unusual challenge for casebook authors: to create a text that stimulates productive thought about the complexities without inundating the student with masses of impenetrable material or uncollated detail.

Federal Courts is first and foremost, a course about power. Though many of the issues concern private disputes and individual rights, two fundamental power relationships underlie them: the states versus the federal government—federalism—and the federal judiciary versus Congress—separation of powers. Moreover, many of those power struggles are played out in the context of disputes between the individual and government, a third type of power relationship. Indeed, the way federalism and separation-of-powers battles are resolved often has a major impact on the power balance between individual and government. The federal courts' primary role is to regulate these conflicts. That is what makes the federal courts special—not just another hierarchical court system.

The importance of the themes of federalism and separation of powers in the study of federal courts requires more attention to American history than in many other courses. The law of contracts, for example, was not directly affected by the Civil War; the law of federal courts was and still is. Political events stimulated many important developments in the law of federal courts. Understanding those causal relationships helps to explain federal courts doctrine.

We have elected, in choosing materials for this book, to focus on those two themes. Apparently disparate topics have in common the underlying themes of federalism and separation of powers, and it is easier to understand the forces that move the Supreme Court in a particular area if one has focused on them in other areas. Most of the chapters involve both themes, and the notes and questions following the main cases attempt to stimulate thought in those terms. Accordingly, we have elected to omit topics that do not illustrate these themes as well, such as the original jurisdiction of the Supreme Court and appellate review within the federal system.

We think there are three things a well-constructed casebook should do. First, it should present the basic themes in the subject matter in an integrated manner that demonstrates their development and interrelationships. Second, it should help students develop their analytical skills by challenging them to deal with case materials that are not too pre-